91-1825

No.

Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CARTERET SAVINGS BANK, FA,

Respondent,

v.

LOUIS G. SHUSHAN, ET AL.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

FRANCIS X. CRAHAY, ESQ.
Counsel of Record

JOSEPH K. COBUZIO, ESQ.
NADIA M. WALKER, ESQ.
On the Brief

TOMPKINS, McGUIRE & WACHENFELD
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4070
(201) 622-3000
Counsel for Petitioners

May 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a naked assertion of alleged fraudulent conduct in a first pleading is sufficient to confer personal jurisdiction over an out-of-state defendant?

2. Whether Louisiana attorneys in a commercial transaction involving Louisiana property and Louisiana law, had the requisite minimum contacts with New Jersey to subject them to suit in New Jersey?

LIST OF PARTIES

Petitioners:

Louis G. Shushan
Donald A. Meyer
Rader Jackson
Jacqueline McPherson
Mitchell W. Herzog
Shushan, Meyer, Jackson, McPherson and Herzog

Respondent:

Carteret Savings Bank, F.A.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	3
STATUTE INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13
THE THIRD CIRCUIT'S DECISION, REVERSING THE DISTRICT COURT AND MAKING A FINDING OF PERSONAL JURISDICTION IS IN CONFLICT DIRECTLY AND IN PRINCIPLE, WITH DECISIONS OF THE UNITED STATES SUPREME COURT	13
A. The Standard To Be Applied	14
B. Personal Jurisdiction Of An Out-Of-State Defendant Is Improper And Without Legal Authority When Based On A Naked Assertion Of Alleged Fraudulent Misrepresentation In A Pleading	22

Page

C. A Finding Of *In Personam* Jurisdiction Based On Petitioners' Activities Within New Jersey Obviates All The Jurisdictional Boundaries Clearly Established By *Burger King*, *Hanson* and *International Shoe* 27

D. A Finding Of *In Personam* Jurisdiction Over Petitioners Is In Complete Disregard Of *World-Wide Volkswagen* 38

CONCLUSION 45

APPENDIX. 1a

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1986) 17, 20, 21, 22, 27, 28, 39, 40, 44

Calder v. Jones, 465 U.S. 783 (1984) ... 36

Carty v. Beech Aircraft Corp., 679 F.2d 1051 (3d Cir. 1982) 15

Compagnie Des Bauxites DeGuinee v. L'Union, 723 F.2d 357 (3d Cir. 1983) 14

DeJames v. Magnificence Carriers, Inc., 654 F.2d 280 (3d Cir. 1981), cert. denied, 454 U.S. 1085 (1981) 15

Dollar Savings Bank v. First Security Bank of Utah, 746 F.2d 208 (3d Cir. 1984) 19

Educ. Testing Serv. v. Katzman, 631 F.Supp. 550 (D.N.J. 1986) 36

Gehling v. St. George School of Medicine, Ltd., 773 F.2d 539 (3d Cir. 1985) 33, 34, 35

Gelineau v. New York University Hospital, 375 F. Supp. 661 (D.N.J. 1974)..... 38

Hanson v. Denckla, 357 U.S. 235 (1958) 16, 17, 20, 27, 30

Page

Helicopteros Nationales de Columbia S.A. v. Hall, 466 U.S. 408 (1984) 18

International Shoe v. Washington, 326 U.S. 310 (1945) 14, 16, 17, 21, 28, 39, 44

McGee v. Int'l Life Ins. Co., 355 U.S. 220 (1957) 21, 28

Mesalic v. Fiberfloat Corp., 897 F.2d 696 (3d Cir. 1990) 16, 17, 32

Provident Nat'l Bank v. Cal. Fed. Savings Loan Assoc., 819 F.2d 434 (3d Cir. 1987) 15

Reliance Steel Products v. Watson, Ess, Marshall and Enggas, 675 F.2d 587 (3d Cir. 1982) ... 29, 31 42

Schaffer v. Heitner, 433 U.S. 186 (1977) 17

Starline Optical Corp. v. Caldwell, 598 F.Supp. 1023 (D.N.J. 1984) 19

Time Share Vacation v. Atlantic Resorts, Ltd., 735 F.2d 61 (3d Cir. 1981) 14

United States Golf Ass'n v. United States Amateur Golf Ass'n, 690 F.Supp. 317 (D.N.J. 1988) 42

Page

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 18, 19, 20, 22, 39, 43, 44

STATE CASES

Avdel Corp. v. Mecure,
58 N.J. 264 (1971) 15

Beckwith v. Bethlehem Steel Corp.,
182 N.J.Super. 376
(Law Div. 1981) 15

Bovino v. Brumbaugh, 221 N.J. Super.
432 (App. Div. 1987) 36, 37, 38

Foont-Freedomfeld v. Electro-Protective,
126 N.J.Super. 254 (App. Div. 1973),
aff'd per curiam,
64 N.J. 197 (1974) 25

Jewish Center of Sussex Cty. v. Whale,
86 N.J. 619 (1981) 25

Lebel v. Everglades Marina,
115 N.J. 317 (1989) 24, 32, 33

Washington v. Magazzu, 216 N.J. Super.
23 (App. Div. 1987) 32, 40 42

Wolpert v. North Shore
University Hospital, 231
N.J. Super. 378
(App. Div. 1989) 36, 37

Page

RELATED CASES

Fishback and Moore, Inc. v. Algernon Blair, Inc., No. 88-1424 (E.D. La. 1988) 7

SNS Contractors, Inc. v. Algernon Blair Inc., No. 89-3091 (5th Cir. 1990) 8

SNS Contractors, Inc. v. Algernon Blair, No. 88-1372 (E.D. La. 1988) 7

STATUTES

28 U.S.C. §1254(1) 3

28 U.S.C. §1291 13

28 U.S.C. §1332(a)(1) 9

28 U.S.C. §1404 10

28 U.S.C. §1406 10

28 U.S.C. §1406(a) 11

FEDERAL RULES

Fed.R.App.P. 4(e) 14

Fed.R.App.P. 40 12

Fed.R.Civ.P. 11 26

STATE RULES

R.4:4-4(c)(1) 15

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

CARTERET SAVINGS BANK, FA,

Respondent,

v.

LOUIS G. SHUSHAN, ET AL.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Louis G. Shushan, Donald A. Meyer, Rader Jackson, Jacqueline McPherson, Mitchell W. Herzog and Shushan, Meyer, Jackson, McPherson and Herzog, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Third Circuit, entered in the above-entitled proceeding on January 13, 1992.

OPINIONS BELOW

The memorandum decision of the Court of Appeals for the Third Circuit, dated February 12, 1992, denying rehearing has not been reported. It is reprinted in the Appendix hereto, p.1a, infra.

The opinion of the Court of Appeals for the Third Circuit, filed January 13, 1992 is reported at 954 F.2d 141 and is reprinted in the Appendix hereto, p. 3a, infra.

The letter opinion and order of the United States District Court for the District of New Jersey, decided on April 23, 1991 is not reported. It is reprinted in the Appendix hereto, p. 42a, infra.

The opinion of the Court of Appeals for the Third Circuit, decided November 19, 1990, is reported at 919 F.2d 225, (Seitz, J., dissenting), and is reprinted in the Appendix hereto, p. 57a, infra.

The opinion of the United States District Court for the District of New Jersey, decided October 10, 1989 is reported at 721 F. Supp. 705, and is reprinted in the Appendix hereto, p. 98a, infra.

JURISDICTION

On January 13, 1992 the United States Court of Appeals for the Third Circuit entered an opinion and order vacating the order of the United States District Court for the District of New Jersey which dismissed the within action for lack of in personam jurisdiction. Petitioners moved for rehearing and rehearing in banc, which motion was denied by order entered February 12, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

No constitutional provisions, treatises, statutes, ordinances or regulations are at issue for purposes of this Petition.

STATEMENT OF THE CASE

This is a malpractice action brought by a New Jersey bank against a Louisiana attorney and his firm.

Carteret Savings Bank, F.A. (hereinafter "Carteret") engaged the Louisiana law firm of Shushan, Meyer, Jackson, McPherson and Herzog as local counsel (hereinafter the "Shushan firm"), in particular Louis G. Shushan, Esq. (hereinafter "Shushan"), for the purpose of representing Carteret's interests in granting an $82,000,000 loan to build a project named Three Lakeway, located in Metairie, Louisiana.

Shushan was contacted in Louisiana in early 1984 by Joseph Tockarshewsky, an officer of Carteret. Tockarshewsky visited Shushan in New Orleans accompanied by Steven A. Cole, another officer of Carteret. Subsequently, Shushan and the Shushan firm were engaged as a local counsel in connection with the negotiations, closing documents, and execution of the Contractors Consent Agreement.

At a time when it appeared that Three Lakeway would select Algernon Blair, Inc., an Alabama corporation (hereinafter "Blair") as the project's general contractor, Tockarshewsky and Cole were notified of the Shushan firm's prior representation of Blair. (A-63)[1] Blair was then notified of the Shushan firm's representation of Carteret and advised that the firm could not represent them in the transaction.

All of the closing documents were prepared in Louisiana and a single pre-closing meeting was held on May 29, 1985 in New Jersey. (SA2-¶6) The meeting was held at the offices of Carteret and lasted for part of the day. The May 29, 1985 meeting was scheduled and orchestrated by Herbert Rinaldi of the New Jersey law firm, Carella, Byrne, Bain and Gilfillan (Carteret's New Jersey counsel in this matter), by telephone from New Jersey to

---

[1]All references designated as "A" and "SA" are to the record below.

Louisiana on May 24, 1985. The five principal participants of the loan attended the meeting, and at that time many of the documents were reviewed and some finalized. The closing was thereafter held in New Orleans on June 12, 1985. The only member of the firm who communicated with Carteret with respect to this matter was Shushan.

In connection with the Three Lakeway loan, Carteret executed a Contractor's Consent Agreement with the general contractor, Blair. This document was the subject of a lawsuit in Louisiana which gave rise to the present malpractice action. This agreement provided, in the event of a default by the borrower, that:

> Lender agrees that the Contractor shall be paid for the work done by it up to the date of such default and termination of the Construction Contract by lender, including a pro rata share of its Construction fee and retainage.

At the heart of this malpractice action is Carteret's allegations that Shushan failed to divulge certain facts during the May 29, 1985

meeting in New Jersey, including that Shushan added this specific term implicating Carteret in the Contractor's Consent.

The document containing this provision was sent to Carteret's general counsel, Herbert Rinaldi; Messrs. Cole and Tockarshewsky; and Mr. Michael Casteix of Jones, Walker, Waechter, Poitevent, Carrere & Denegre, local counsel for one of the lenders, the Prospect Company (Travelers Ins. Co.). Furthermore, Mr. Casteix and the Travelers were also aware of Shushan's prior representation of Blair.

Eventually, the borrower defaulted on the Three Lakeway loan and the Contractor's Consent Agreement and Certification between Blair and Carteret was the subject of adjudication in the Federal District Court for the State of Louisiana in an action captioned SNS Contractors, Inc. v. Algernon Blair, No. 88-1372 (E.D. La. 1988), Section "H", Magistrate Division 5, consolidated with Fishback and Moore, Inc. v. Algernon Blair, Inc., No. 88-1424

(E.D. La. 1988), Section H, Magistrate Division 5. Carteret joined Shushan and the Shushan firm in that litigation by way of Third-Party Complaint but did not pursue it. Subsequently, that Court found in favor of Blair and entered a judgment against Carteret. The judgment was appealed and denied. SNS Contractors, Inc. v. Algernon Blair Inc., No. 89-3091 (5th Cir. 1990). During the pendency of the Louisiana litigation, Carteret brought the instant suit against Shushan in the District of New Jersey.

Shushan is not admitted to practice before the Courts of New Jersey. (SA3-¶7) He and his firm have not handled any matters in New Jersey. (SA3-¶7) He and his firm do not advertise in New Jersey. (SA3-¶8) He was retained as local counsel in the course of a phone call from New Jersey to Louisiana placed by Tockarshewsky. (SA2-¶2) With the limited exception of any changes made at the May 29, 1985 New Jersey meeting, all the work in preparing the voluminous closing documents and

the Contractor's Consent took place in Louisiana. (SA2-¶3)

All documents prepared by Shushan relating to the closing of Three Lakeway were reviewed by Herbert Rinaldi of the New Jersey law firm of Carella, Byrne, Bain & Gilfilian, who also represented Carteret in this matter.

Shushan's only presence in the State of New Jersey was at the meeting held on May 29, 1985 for the purpose of reviewing closing documents. The pre-closing meeting was arranged by Mr. Rinaldi to be conducted in New Jersey.

Invoking federal jurisdiction under 28 U.S.C. §1332(a)(1), Carteret brought this instant suit in the United States District Court for the District of New Jersey. In fact, Carteret's first complaint was word-for-word identical with that filed in Louisiana. (SA-7) Shushan filed a timely motion to dismiss the complaint for lack of in personam jurisdiction. As a result of Shushan's meaningful jurisdictional challenge, Carteret cross-moved for

leave to file an amended complaint alleging an intentional tort of fraud on the part of Shushan and the Shushan firm to advance a jurisdictional argument.

Instead of an outright grant of Shushan and the Shushan firm's motion, the court invited them to move to transfer for lack of venue. This motion to transfer venue pursuant to 28 U.S.C. §1404 was filed only as an alternative to the pending motion to dismiss the complaint for lack of in personam jurisdiction. Upon further argument and consideration, Judge Politan issued an order on June 29, 1989, (i) dismissing the action for lack of personal jurisdiction over the petitioners, and (ii) transferring the matter to the District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. §1406. See p. 113a, infra. The district court reasoned that Carteret could not demonstrate that the respondents had sufficient contacts with New Jersey for personal jurisdiction and it also rejected Carteret's assertion

of an intentional tort at the sole New Jersey meeting as "factually incorrect".

Carteret moved for reconsideration, modification or certification for appeal of the June 29, 1989 order. In its opinion dated October 13, 1989, the district court denied the motions and confirmed the transfer of the action under 28 U.S.C. §1406(a). (p. 98a)

On Carteret's appeal and petition for writ of mandamus, the Third Circuit on November 19, 1990 dismissed the appeal, (Seitz, J., concurring in part, dissenting in part) for lack of appellate jurisdiction and issued a partial writ of mandamus directing Judge Politan to vacate ¶2 of the June 29th Order, to wit... "under the provision of [28 U.S.C. 1406(a)] the within matter is transferred to the United States District Court for the Eastern District of Louisiana." (p. 57a)

The Court of Appeals then conceived of only two courses the case could take in district court: (i) dismissal for lack of personal

jurisdiction; or (ii) transfer to Louisiana. (See p. 89a, infra) Shushan then moved for a rehearing en banc of the partial petition of mandamus pursuant to Fed.R.App.P. 40, based on the dissent in the opinion. This was denied on January 17, 1991.

The matter was remanded and again heard before Judge Politan. At his request, supplemental memoranda of law were submitted by both parties. After consideration of the papers submitted, Judge Politan ordered that the matter remain dismissed for lack of in personam jurisdiction. Specifically, Judge Politan vacated ¶2 of the Order dated June 29, 1989 which transferred the matter to the Eastern District of Louisiana; granted the plaintiff's motion to amend the Complaint nunc pro tunc; and ordered that the matter remain dismissed for lack of in personam jurisdiction, as their were no contacts sufficient to exercise jurisdiction over the defendants. (p. 42a)

Respondent appealed and the Third Circuit exercised appellate jurisdiction pursuant to 28 U.S.C. §1291. On January 13, 1992, the Third Circuit vacated the District Court's order dismissing the action for lack of personal jurisdiction. The Court held that since plaintiff avers that Shushan committed a fraudulent misrepresentation while attending the pre-closing meeting in New Jersey, this mere allegation is sufficient to invoke New Jersey jurisdiction. Additionally, regarding a claim of breach of a fiduciary duty, Shushan had sufficient minimum contacts with New Jersey during the course of his representation of Carteret for the exercise of specific jurisdiction. (See p. 3a, infra.)

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT'S DECISION, REVERSING THE DISTRICT COURT AND MAKING A FINDING OF PERSONAL JURISDICTION IS IN CONFLICT DIRECTLY AND IN PRINCIPLE, WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

This Petition involves a question of exceptional importance, to wit, the finding of

jurisdiction over an out-of-state attorney, solicited by a national lending institution to perform a real estate transaction in his home state, based on a random half-day meeting arranged and called for by the lending institution in New Jersey, which finding obviates all jurisdictional boundaries and flies in the face of International Shoe v. Washington, 326 U.S. 310 (1945) and its progeny.

A. The Standard To Be Applied.

In cases where the defendants have properly raised a jurisdictional defense, "the plaintiff bears the burden of demonstrating contact with the forum state sufficient to give the court in personam jurisdiction." Time Share Vacation v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1981) (quoting Compagnie Des Bauxites De Guinee v. L'Union, 723 F.2d 357, 362 (3d Cir. 1983)).

Pursuant to Fed.R.Civ.P. 4(e), a federal district court can exercise personal jurisdiction over a non-resident defendant to

the extent allowed by the court of the state where the court sits. See Provident Nat'l Bank v. Cal. Fed. Savings Loan Assoc., 819 F.2d 434, 436 (3d Cir. 1987). This is in accord with the Civil Practice Rules of New Jersey, to wit: R.4:4-4(c)(1), which permits service on non-resident defendants "to the uttermost limits permitted by the United States Constitution." Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971); Beckwith v. Bethlehem Steel Corp., 182 N.J.Super. 376, 383 (Law Div. 1981). Thus, New Jersey's long arm statute is co-extensive to due process laws of the Constitution. DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 284 (3d Cir. 1981), cert. denied, 454 U.S. 1085 (1981) (interpreting the New Jersey long arm rule); See also, Carty v. Beech Aircraft Corp., 679 F.2d 1051, 1051 (3d Cir. 1982) (when a state statute contains language providing that jurisdiction extends to the limits of the Constitution, the Third Circuit has focused on the due process requirement). As a result, the

amenability to suit of the non-resident defendants, Shushan and the Shushan firm, in the present case must be evaluated by fourteenth amendment standards. Mesalic v. Fiberfloat Corp. 897 F.2d 696 (3d Cir. 1990).

For the plaintiff to establish in personam jurisdiction over a non-resident defendant, the non-resident defendant must have some relationship with the state or its citizens. "In order to subject the defendant to a judgment in personam, when he is not present within the territory of the forum, he must have certain 'minimal contacts' with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe v. Washington, 326 U.S. 310, 316 (1945). The cases which followed this decision continue to refine this principal.

For example, in Hanson v. Denckla, 357 U.S. 235 (1958), this Court stated that "it is essential in each case that there be some act by which the defendant purposely avails himself of

the privilege of conducting his activities within the foreign state, thus invoking the benefits and protections of its law." Id. at 253 (emphasis added); Mesalic, 897 F.2d at 699. This requirement was again expressed in Burger King Corp. v. Rudzewicz 471 U.S. 462 (1986), wherein "purposeful availment" was noted as the requirement that "ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts ..." Id. at 475.

"The due process clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties or relationship." International Shoe, 326 U.S. at 319. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," Schaffer v. Heitner, 433 U.S. 186, 218 (1977), the due process clause "gives a degree of predictability to the legal system

that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit". World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

A potential defendant may have been said to be "fairly warned" in two situations:

First, a court may permissibly exercise what has been referred to as "general jurisdiction" over any defendant who has maintained "continuous and substantial" forum affiliations, even if the plaintiff's claim does not arise out of or is unrelated to those foreign affiliations. Helicopteros Nationales de Columbia S.A. v. Hall, 466 U.S. 408 (1984).

For a court to exercise general jurisdiction, the defendant must have significantly greater "continuous and systematic" contacts with the forum state. Helicopteros Nationales de Columbia, S.A., 466 U.S. at 414. A defendant who is not doing

business in the forum does not satisfy the test of general in personam jurisdiction.

Alternatively, "specific jurisdiction" may be invoked "when a plaintiff's claim is 'related to or arises out of' the defendant's contacts with the forum. Only in the latter is minimum contacts analysis appropriate." Dollar Savings Bank v. First Security Bank of Utah, 746 F.2d 208, 212 (3d Cir. 1984). This is a more lenient standard and defines minimum contacts as those "specific" to in personam jurisdiction based on contacts related to the particular cause of action.

The contacts with the forum state must relate not only to their quantity and quality, but also to the cause of action which hales them into court. Starline Optical Corp. v. Caldwell, 598 F.Supp. 1023, 1025 (D.N.J. 1984) (citing World-Wide Volkswagen, 444 U.S. at 297).

This Court has provided instruction with respect to when potential defendants should "reasonably anticipate" being sued out-of-state.

In this respect, our courts frequently draw from the reasoning of Hanson, 357 U.S. at 253:

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws (emphasis added).

Cited in Burger King Corp., 471 U.S. at 474, 475.

This "purposeful availment" requirement ensures that a defendant may not be subject to the jurisdiction solely as a result of "random", "fortuitous" or "attenuated" contacts. World-Wide Volkswagen, 444 U.S. at 299. For example, in this case, Shushan's one meeting on May 29, 1985. The contacts must be proximately caused by the actions of the defendant himself which create a 'substantial connection' with the forum state, not that of the person claiming jurisdiction over the

defendant -- in this case Carteret. Burger King Corp., 471 U.S. at 475; McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957). There is no question that Shushan and the Shushan firm are not subject to the general jurisdiction of the district court. Therefore, the appropriate standard to apply is that of specific jurisdiction.

Yet even if it is decided that a defendant purposely established minimum contacts within the forum state, these contacts should be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial justice." International Shoe, 326 U.S. at 320. For example, but not by way of limitation, a court may evaluate (i) "the burden on the defendant", (ii) "the forum state's interest in adjudicating the dispute," (iii) "the plaintiff's interest in obtaining convenient and effective relief," (iv) "the interstate judicial systems interested in

obtaining the most efficient resolution of controversies," and (v) "shared interest of the ... states in furthering fundamental substantial social policies." World-Wide Volkswagen Corp., 444 U.S. at 292; Burger King Corp., 471 U.S. at 477.

In applying the above standards, clearly, Shushan and the Shushan firm are not subject to the jurisdiction of the District Court for the District of New Jersey.

B. Personal Jurisdiction Of An Out-Of-State Defendant Is Improper And Without Legal Authority When Based On A Naked Assertion Of Alleged Fraudulent Misrepresentation In A Pleading.

In the instant case, the Third Circuit placed great significance on Carteret's "naked assertion" of an alleged fraudulent misrepresentation while present during a half day "random" meeting in New Jersey which was arranged and programmed by Carteret. This brief meeting was the basis upon which the Third Circuit relied in finding jurisdiction over Shushan. However, aside from the merits,

reliance on this allegation overlooks two significant factors: (1) no misrepresentation could have taken place as a matter of law; and (2) the May pre-closing meeting in and of itself was "random and fortuitous" and thus there could not have been a conscious decision by Shushan to have "purposely availed" himself and his firm to New Jersey law within the meaning of our jurisprudence.

As to the first issue, the court below focused on Carteret's Amended Complaint (Count Two) wherein Carteret alleges that Shushan "failed to divulge several significant facts during the May meeting" (p. 9a, infra). The court further noted that Carteret "avers that Shushan committed a fraudulent misrepresentation in New Jersey..." (p. 18a, infra). "Carteret alleges that the content of the Contractor's Consent and Certification was not even discussed at the ... meeting ... this is the crux of Carteret's fraudulent misrepresentation claim..." (p. 20a, infra). Thus, silence by a

defendant, in a foreign jurisdiction, at a meeting randomly called, not by him, has been translated by this ruling into a jurisdictional finding.

The Third Circuit continued that "personal jurisdiction may be exercised over a non-resident defendant who, while present in the forum state, makes a deliberate misrepresentation during the course of negotiations [(which there were none here)] or other direct communications" (p. 21a, infra). In support of this proposition it relied on a Treatise of Robert C. Casad, entitled Jurisdiction in Civil Actions. Not one New Jersey case is cited in the treatise to support this proposition, and significantly, Lebel v. Everglades Marina, 115 N.J. 317 (1989) with its special jurisdictional ingredients is not mentioned. Note that the New Jersey Supreme Court in Lebel recognized that it was pushing the "outer most limit" of personal jurisdiction. Id. at 329. However, Lebel's jurisdictional

elements were far different and much stronger than the elements of the instant case.

An intentional misrepresentation or legal fraud "consists of a material representation of a presently existing or past fact, made with knowledge of its falsity, with the intention that the other party rely thereon, and he does so rely to his damage." Foont-Freedomfeld v. Electro-Protective, 126 N.J. Super. 254, 257 (App. Div. 1973), aff'd per curiam, 64 N.J. 197 (1974); see, Jewish Center of Sussex Cty. v. Whale, 86 N.J. 619, 625 (1981). The omission, or failure to discuss a particular provision in the case at bar could not be considered an intentional or fraudulent misrepresentation. It would, if anything, be an alleged breach of a fiduciary duty by an attorney to his client. This is the very essence of Carteret's original complaint and Count One of the Amended Complaint. Therefore, any intentional "misrepresentation" by Shushan would arguably have been made in Louisiana when

the Contractor's Consent provision was purportedly "slipped in at the 11th hour." Therefore, if no intentional misrepresentation could have been made as a matter of law, then the court cannot rely on this averment to establish jurisdiction. To do so would surely encourage frivolous pleading in order to secure a plaintiff's choice of forum. The Third Circuit's reminder that Fed.R.Civ.P 11 should be a deterrent to Carteret's forum shopping is of little comfort. (p. 30a, infra). Here, Rule 11 does not assist a defendant in streamlining the proceeding or being provided with efficient judicial relief since he must wait either until the completion of discovery on jurisdictional issues or the completion of trial to bring such a motion. Fed.R.Civ.P. 11.

C. A Finding Of In Personam Jurisdiction Based On Petitioners' Activities Within New Jersey Obviates All The Jurisdictional Boundaries Clearly Established By Burger King, Hanson and International Shoe

Forcefully, in Hanson v. Denckla, 357 U.S. 235 (1958), the Supreme Court stated that "it is essential in each case that there be some act by which the defendant purposely avails himself of the privilege of conducting his activities within the forum state, thus invoking the benefits and protections of its law." Id. at 253 (emphasis added) The Supreme Court in Burger King Corp. v. Rudzewicz 471 U.S. 462 (1986), described purposeful availment as that requirement which "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts ..." (emphasis supplied) Id. at 475. This is exactly what transpired in the case at bar with Shushan's half-day pre-closing, called for in New Jersey, not by him but by the Bank. (SA2-¶6). As a result,

Shushan's liberty interest is being violated by being subject to a potential judgment of a forum with which he has established "no meaningful contacts, ties or relationship." International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)(Emphasis supplied). The unilateral activity of those who claim some relationship with a non- resident defendant cannot satisfy the requirement of contact with the forum state. Burger King Corp., 471 U.S. at 474, 475; citing Hanson, 357 U.S. at 253.

Surely Carteret's "unilateral activity" by and through its general counsel in soliciting Shushan for a meeting in New Jersey is precisely what our Court had in mind. The contacts must be proximately caused by the actions of the defendant himself which create a 'substantial connection' with the forum state, not that of the person claiming jurisdiction over the defendant -- in this case Carteret. Burger King Corp., 471 U.S. at 475; McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957).

It is clear, and the district court so ruled, 721 F.Supp. at 707, (p. 98a, infra) that Shushan did not purposefully direct his activities at residents of the forum; rather, he directed his activities in the state of Louisiana. The Third Circuit felt that Reliance Steel Products v. Watson, Ess, Marshall and Enggas, 675 F.2d 587 (3d Cir. 1982) was not operative notwithstanding its pronouncements on "purposeful availment" which are instructive. The solicitation of Shushan by Carteret's general counsel for the New Jersey meeting was a unilateral activity which the Third Circuit overlooked. It is evidenced by Carteret's general counsel's, Mr. Herbert Rinaldi, Esq., billing statement for work performed on May 24, 1985 (5 days before the meeting at issue and 16 days after Shushan forwarded the subject document to Mr. Rinaldi), which states:

> Meeting with Cole regarding documents; further review of documents; phone calls to various participants, attorneys, and Louis Shushan to arrange meeting on 5/29/85 at CBB&G. (emphasis supplied)

Note that Carteret was a lead bank in a consortium of lenders which included The Travelers Insurance Company of Hartford, Connecticut with counsel in Dallas, Texas, and Louisiana; Ensign Bank F.A. of New York with counsel in New York, New York; Perpetual American Mortgage Company of McClean, Virginia; and Investors Savings and Loan Association of Richmond, Virginia. Thus and indeed, a random and fortuitous meeting of Carteret's choice.

Surely, Shushan's fleeting or fortuitous forum connection lacks the requisite element of intentional invocation of New Jersey's benefits sufficient to satisfy the requirements of Hanson v. Denckla and its progeny.

Even if one assumes that the Court is correct in finding the averment by Carteret of an intentional misrepresentation, and Shushan's meeting as not "fortuitous," one cannot blindly consider the allegations of fraud, raised by Carteret, as true in light of the facts of

record in this matter. Furthermore this Court should not lose focus of the service for which Shushan was engaged -- a Louisiana closing. The court below stated that the allegation of intentional misrepresentation must be accepted as true without regard to any facts before it. This is in total disregard of Reliance wherein the court considered what the plaintiff needed to win its case on the merits. A review of the methodic explanation contained in the Affidavit of Louis G. Shushan clearly shows that the subject Contractor's Consent clause, purportedly "slipped" in at the "eleventh hour," and Shushan's alleged intentional failure to disclose the clause at the May 29th meeting, is wholly without merit and only Carteret's "best shot" at keeping Shushan and his firm here in New Jersey -- the forum of its choice. Just as the object of the defendant attorney's New Jersey contacts was to perform the services exclusively in Virginia was a factor that outweighed the ultimately jurisdictional

significance of the New Jersey contacts in Washington v. Magazzu, 216 N.J. Super. 23 (App. Div. 1987), so too is Shushan's brief pre-closing meeting.

The Third Circuit's reliance on Lebel, 115 N.J. 317 (1989) is misplaced. (p. 25a, infra). The decisive distinguishing factor is that that case was based on commerce considerations, e.g. a transaction for goods as opposed to legal representation or services. The same can be said of the decision in Mesalic v. Fiberfloat Corp., 897 F.2d. 696 (3d Cir. 1990).

In Lebel, the plaintiff met a representative of the defendant retailer at a boat show in New York City to purchase a 1987 Cigarette SE-38-foot luxury racing boat to be used in New Jersey. 115 N.J. at 320. Plaintiff received and signed in New Jersey, a Sales Agreement. Id. Plaintiff hired a third party shipper to bring the boat to New Jersey. Id. Most importantly, during the period from the

plaintiff's first meeting with the representative at the New York Boat Show until the purchase of the boat, the defendant on at least 20 occasions made phone calls to New Jersey to solicit the plaintiff. Id. (As noted above, the New Jersey Supreme Court opined that it was, in that case, pushing jurisdiction to the "outermost limits." Id., at 329. Clearly, there has been no solicitation by Shushan, but rather by Carteret in Louisiana.

The Court employed, in its ruling, Gehling v. St. George School of Medicine, Ltd., 773 F.2d 539 (3d Cir. 1985), (p. 22a, infra) but that case is inapposite and was clearly decided in an "international" contacts context. Gehling involved a wrongful death action against a medical school in Grenada by the parents of a Pennsylvania student who died after running in a school sponsored race. Id. Gehling supports defendants' rather than plaintiff's position. Plaintiffs brought a wrongful death action against St. George's School of Medicine, Ltd.,

alleging, inter alia, negligence, breach of contract, fraudulent misrepresentation and intentional infliction of emotional distress. Id.

The defendants in Gehling filed a motion to dismiss the Complaint for lack of personal jurisdiction. The Third Circuit affirmed the order of dismissal but for the claims of fraudulent misrepresentation and emotional distress. Id. at 540. In determining whether minimum contacts were present, the court scrutinized the relationship between the defendant, the forum and the litigation. For example, the defendants' solicitation of students by placing advertisements in the New York Times and Wall Street Journal; a "media swing," including radio and television shows in Pennsylvania as well as other states; and a joint international program with a local Pennsylvania college. Notwithstanding these factors, the court concluded that the plaintiff failed to show a "sufficient nexus between St.

George's and Pennsylvania to subject St. George's to personal jurisdiction for claims arising from non-forum related activities." Id. at 542.

With regard to the contacts arising out of forum related activities, the court found that "we cannot say that St. George's 'purposely availed' itself of the 'privilege of acting' within Pennsylvania by mailing its letter of acceptance to the decedent," despite the various items sent to and from Pennsylvania regarding acceptance, matriculation and other admission information. Id. at 544. Thus, all claims other than fraudulent misrepresentation and intentional infliction of emotional distress were dismissed.

The latter claims supported jurisdiction, since the court found that the defendants' representative, after having traveled to Pennsylvania to deliver the body, specifically and "fraudulently misrepresented the cause of death," thereby causing emotional distress. Id.

at 544. In the instant case, at the half-day random and fortuitous meeting called by Carteret's general counsel, at Roseland, New Jersey, the record is utterly silent as to any specific or factual misrepresentation which impacted, in anyway, the Louisiana closing.[2]

Reliance on Wolpert v. North Shore University Hospital, 231 N.J. Super. 378 (App. Div. 1989) to support the argument as to how New Jersey courts would rule on the matter is also misplaced. Initially, the Appellate Division itself failed to even attempt to reconcile its decision in Wolpert with the ruling of the court in Bovino v. Brumbaugh, 221 N.J. Super. 432

---

[2]This court indicated that the effects test may be used to establish in personam jurisdiction (p. 26a). However, it should be noted that the "effects test" is not without limitation. In Educ. Testing Serv. v. Katzman, 631 F.Supp. 550, 562 (D.N.J. 1986), the court endorsed the effects test but only in limited circumstances. "It is still an open question whether, after Calder v. Jones, 465 U.S. 783 (1984) due process concerns will permit the use of the effects test in every tort action," since on its face the effects test would appear to abolish the minimum contacts standard. Id. at 563.

(App. Div. 1987). Moreover, the recommendations of a foreign physician for the long-term physical treatment plan of a patient clearly entails a more continuing effect in the forum in its possible life-long effect on the patient than Shushan's half-day visit. The Third Circuit overlooked, as did Wolpert, the distinction between professional services and sale of goods which was made in Bovino:

> The case at bar does not involve a product which was deliberately or foreseeably shipped into the forum state's markets. It focuses on a service, not performed in the forum state but in a foreign state, rendered after the plaintiff voluntarily traveled to the foreign state so that he could benefit from that service which was available there only.
>
> When one seeks out services which are personal in nature, such as those rendered by attorneys, physicians, dentists, hospitals or accountants, and travels to the locality where he knows the services will actually be rendered, he must realize that the services are not directed to impact on any particular place. While it is true that the nature of such services is that if they are negligently done, their consequences will thereafter be felt wherever the client or patient may go, it would be fundamentally

> unfair to permit a suit in whatever distant jurisdiction the patient may carry the consequences of his treatment, or the client the consequences of the advice received. (emphasis supplied)
>
> * * * *
>
> Any other rule would seem to be not only fundamentally unfair, but would inflict upon the professions the obligation of traveling to defend suits brought in foreign jurisdictions, sometimes very distant jurisdictions, there brought solely because the patient or client upon his return to his own home decided to sue at home for services sought by himself abroad. (emphasis supplied)
>
> Such rule would have a chilling effect on the availability of professional services to non-residents.

Bovino, at 221 N.J. Super. 437-8, citing Gelineau v. New York University Hospital, 375 F. Supp. 661 (D.N.J. 1974).

In a word, this case is purely a Louisiana matter.

D. A Finding Of In Personam Jurisdiction Over Petitioners Is In Complete Disregard Of World-Wide Volkswagen.

The Third Circuit egregiously overlooked and disregarded the other factors

which should be considered when the assertion of personal jurisdiction would not comport with "fair play and substantial justice." International Shoe, 326 U.S. at 320. For example, but not by way of limitation, a court may evaluate (i) "the burden on the defendant", (ii) "the forum state's interest in adjudicating the dispute," (iii) "the plaintiff's interest in obtaining convenient and effective relief," (iv) "the interstate judicial systems interest in obtaining the most efficient resolution of controversies," and (v) "shared interest of the ... states in furthering fundamental substantial social policies." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Burger King Corp., 471 U.S. 477.

Insofar as the first requirement, the Court below ignored the burden on the defendant in litigating this case in New Jersey. For example the location of fifteen (15) witnesses who would be called upon to testify at deposition or trial. Certainly the assumption

can be made that the defendant would incur the appearance fee, travel expenses and perhaps other costs associated with a non-party fact witness who is outside the court's subpoena power. At least three liability witnesses required by Shushan reside in Louisiana. Only three of the fifteen hale from the New Jersey area.

Insofar as the second factor, choice of law is important in considering jurisdiction over the person. Burger King, 471 U.S. at 479-82. This is acknowledged by the Third Circuit in a cryptic reference in light of Count One of the Amended Complaint. Louisiana law would apply to Count One of the Amended Complaint.

In Magazzu, the defendant presented a compelling case that the aforementioned factors rendered the exercise of jurisdiction unreasonable over him in New Jersey. That court determined it would be burdensome on all parties if the dispute was adjudicated in New Jersey rather than in Virginia. Plaintiff's underlying

claims were against a Virginia medical doctor and a Virginia hospital for medical malpractice that allegedly occurred in Virginia. The court held that the plaintiffs must try the medical malpractice claims in their legal malpractice action as those claims would have been tried in Virginia under Virginia law. The court reasoned that it would be convenient to all parties, satisfy both states' interests in an efficient resolution of the controversy, and provide plaintiffs the most effective relief if the action were tried in Virginia, where almost all the key witnesses resided, where most vital evidence was to be found, and where Virginia law and practice could more readily be applied to measure the worth, if any, of plaintiff's underlying malpractice claims.

That court determined that even though the plaintiffs resided in New Jersey, Virginia had an attenuated interest in adjudicating the dispute over the failure of a Virginia attorney to commence an action in Virginia alleging

medical malpractice that occurred in Virginia. The fact that a non-resident lawyer's alleged malpractice affected clients who happened to live in the forum state has not been considered a dominant jurisdictional factor. Magazzu, 216 N.J. Super. at 29; Reliance Steel Product, 675 F.2d at 589. Accordingly, the matter was dismissed.

Furthermore, Carteret's Vice President stated, in response to the question: "[w]hether or not Carteret Savings Bank was a lender on a national basis as opposed to two or three states in the neighboring area," that "we [Carteret Savings Bank] had no specific [geographic] guideline." This factor was of particular importance in United States Golf Ass'n v. United States Amateur Golf Ass'n, 690 F.Supp. 317, 322 (D.N.J. 1988), wherein Judge Politan noted that the plaintiff "is not a small New Jersey oriented company, but rather is one of nationwide, if not international, significance... it would impose no burden upon

plaintiff to litigate in California as distinguished from New Jersey". (Defendants were found to have deliberately entered, advertised and promoted themselves in New Jersey by direct mail solicitation and, therefore, jurisdiction was warranted.) There is evidenced by the forum selection clause in the underlying loan agreement, wherein Carteret agreed that the governing law regarding the Contractor's Consent and Certification would be that of Louisiana.

Finally, Louisiana certainly has a paramount interest in assuring the integrity of its bar in adjudicating any professional negligence or malfeasance claims against a Louisiana attorney. Moreover, World-Wide Volkswagen clearly admonished that "the Framers also intended that states retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts." 444 U.S. at 293. The power to regulate the Louisiana bar and bench is an indispensable aspect of Louisiana sovereignty

and necessarily "implie[s] a limitation on the sovereignty of all of its sister states." Id. To find otherwise would overburden our courts with boundless forum-shopping and obviate all the jurisdictional boundaries clearly established by International Shoe, World-Wide Volkswagen and Burger King. Thus, application of the above "fairness" and "reasonable" factors of Burger King would require New Jersey to decline jurisdiction over Shushan, irrespective of any finding of sufficient minimum contacts.

In sum, the defendants did not maintain the requisite minimum contacts with New Jersey to warrant personal jurisdiction over them. Further, even assuming that they had, there are other factors which make jurisdiction unreasonable. In a word, this is a Louisiana matter.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the Writ of Certiorari.

Respectfully submitted,

TOMPKINS, McGUIRE & WACHENFELD
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4070
(201) 622-3000
Counsel for Petitioners

Francis X. Crahay
Counsel of Record

JOSEPH K. COBUZIO, ESQ.
NADIA M. WALKER, ESQ.
On the Brief

DATED: May 8, 1992